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**SOAH DOCKET NO. 473-21-0538
PUC DOCKET NO. 51415**

APPLICATION OF SOUTHWESTERN	§	PUBLIC UTILITY COMMISSION
ELECTRIC POWER COMPANY FOR	§	
AUTHORITY TO CHANGE RATES	§	OF TEXAS

**OFFICE OF PUBLIC UTILITY COUNSEL'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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**OFFICE OF PUBLIC UTILITY COUNSEL’S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

The Office of Public Utility Counsel (“OPUC”), representing the interests of residential and small commercial consumers in Texas, respectfully submits these exceptions to the proposal for decision (“PFD”) issued by the State Office of Administrative Hearings (“SOAH”) in this proceeding on August 27, 2021.

The PFD recognizes the many flaws in Southwestern Electric Power Company’s (“SWEPCO”) application identified by OPUC, other intervenors, and Staff of the Public Utility Commission of Texas (“Commission Staff”).

Additionally, in the rate design portion, the PFD recognizes the efforts of SWEPCO to bring all consumer classes as close as possible to their cost basis for providing service, ensuring rates that are just and reflective of the costs of providing service.

OPUC is not filing exceptions on every issue in which its position was not adopted in the PFD. OPUC’s exceptions are limited to the recommendations made by the SOAH Administrative Law Judges (“ALJ”) relating to: (1) allowing SWEPCO to continue to earn a return on the Dolet Hills Lignite Company and Oxbow Mine, (2) allowing SWEPCO \$5 million in vegetation management expense, (3) allowing SWEPCO to recover employee performance awards that include amounts awarded in March 2020, and (4) allowing SWEPCO to recover costs associated with financially based incentive compensation for union employees, in direct contradiction of Public Utility Commission of Texas (“Commission”) precedent. For the reasons discussed below, OPUC requests that the Commission issue an order in this proceeding consistent with OPUC’s exceptions.

IV. Invested Capital - Rate Base [PO Issues 4, 5, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22]

A. Generation, Transmission, and Distribution Capital Investment [PO Issues 4, 5, 10, 11, 13, 14, 15, 16]

2. Dolet Hills Power Station [PO Issues 67, 68, 69, 70, 71]

1. Oxbow Mine Reserves

2. Dolet Hills Lignite Company

OPUC appreciates the considerations of the ALJs and agrees with their findings regarding the need to place cost recovery for operations of the Dolet Hills Power Station into a separate rate rider.¹ However, OPUC disagrees with their conclusions that also place the Oxbow Mine Reserves (“Oxbow”) and Dolet Hills Lignite Company (“DHLC”) into the proposed rate rider as well, allowing for a return on the investment until the retirement of Dolet Hills.²

OPUC supports the decision of the ALJs to remove the Oxbow mine and DHLC from base rates and place them into a rate rider for amortization purposes, providing a return *of* SWEPCO’s investment. However, OPUC recommends that the PFD be amended to exclude any return *on* the Oxbow mine investment and any recovery of the DHLC equity and taxes from rates altogether, rather than allowing these return components in the rate rider through the retirement of Dolet Hills. The Oxbow mine and DHLC are no longer providing a benefit to rate payers that is not already taken into account in the lignite inventory to be included in the rate rider and any recovery of actual lignite used through the fuel factor.

While the ALJs state that SWEPCO witness Mr. Michael Baird testified that Oxbow and DHLC continue to provide a benefit to SWEPCO,³ OPUC counters that Mr. Baird’s testimony in fact shows that Oxbow and DHLC should be removed as they are no longer providing value to ratepayers. First, with regards to the Oxbow Mine Reserve, the Oxbow Mine ceased operations in

¹ PFD at 52 – 53 (Aug. 27, 2021).

² *Id.* at 57 – 58.

³ *Id.*

May 2020.⁴ What remains of Oxbow is only the lignite already mined.⁵ DHLC, according to Mr. Baird, delivers the mined lignite to Dolet Hills.⁶ Dolet Hills is directly adjacent to the Oxbow reserves.⁷

OPUC would argue that the mere existence of already mined lignite (to justify Oxbow) and “delivery” from an adjacent area next to Dolet Hills (to justify DHLC), hardly constitutes providing benefit to ratepayers. As pointed out by SWEPCO Witness Mr. Baird, the lignite already mined will be recovered eventually through SWEPCO’s fuel proceedings when burned.⁸ Mr. Baird claimed, and the ALJs agreed, that OPUC’s amortization and fuel recovery would amount to a double recovery on Oxbow.⁹ Unfortunately, allowing SWEPCO a return *on* a no longer used and useful asset, will yield a higher recovery for SWEPCO and amounts to a larger over recovery.

OPUC therefore respectfully requests that the Commission reconsider this position and disallow any return *on* the Oxbow mine reserves and any recovery of the DHLC associated taxes and expenses from the rate rider. OPUC urges the Commission to allow cost recovery for Oxbow mine in accordance with OPUC’s position that provides for the amortization of the remaining investment in the Oxbow mine over the same 25-year life of Dolet Hills.¹⁰

VII. Expenses [PO Issues 1, 14, 24, 29, 30, 32, 33, 40, 41, 42, 44, 45, 46, 49, 72, 73, 74]

A. Transmission and Distribution O&M Expenses [PO Issues 14, 24]

5. Distribution Vegetation Management Expense & Program Expansion [PO Issue 27]

OPUC respects the decision of the ALJs to allow SWEPCO \$5 million in vegetation management expense and appreciates the decision of the ALJs to include the requirement of a compliance docket to show continued progress from SWEPCO in its vegetation management

⁴ Direct Testimony of Thomas P. Brice at 6 (Oct. 14, 2020). (“Brice Direct”)

⁵ Rebuttal Testimony of Michael A. Baird at 21 – 22 (Apr. 23, 2021). (“Baird Rebuttal”)

⁶ *Id.* at 21 – 22. *See also* PFD at 57.

⁷ Brice Direct at 5.

⁸ Baird Rebuttal at 22.

⁹ *Id.* *See also* PFD at 58.

¹⁰ OPUC’s Post Hearing Initial Brief at 7 – 9 (Jun. 17, 2021). (“OPUC Initial Brief”)

efforts.¹¹ However, OPUC would request that the Commission reconsider this position and amend the PFD to reject, outright, SWEPCO's request for additional vegetation management expense.

OPUC reiterates the arguments made in its initial post hearing brief and reply brief that SWEPCO has failed to demonstrate a positive correlation between increased spending and positive reliability results.¹² It is OPUC's concern that the awarding of funds prior to a broader demonstration of correlation by SWEPCO will result in additional spending at the expense of ratepayers that yields little in the way of results.¹³ As the ALJs note, "OPUC, CARD, and TCGA already raise reasonable concerns about whether additional spending is worthwhile."¹⁴ OPUC requests that the Commission heed their warnings and recognize those concerns by denying SWEPCO additional vegetation management funds until such time that SWEPCO can demonstrably show the benefits of additional funding.

C. Labor Related Expenses

2. Incentive Compensation

a. Short-Term Incentive Compensation

i. Known Short-Term Incentive Compensation ("STI")

As the ALJs correctly note, OPUC seeks to reduce SWEPCO's short term incentive compensation by limiting the amounts awarded to those amounts of Short-Term Incentive Compensation awarded in 2019.¹⁵ It is OPUC's position that a) SWEPCO used estimates beyond the test year to include short term incentive compensation from 2020;¹⁶ b) SWEPCO's use of estimates for 2020 does not constitute a "known and measurable" change under 16 TAC §

¹¹ PFD at 166.

¹² OPUC Initial Brief at 14 – 15. OPUC's Post Hearing Reply Brief at 6 – 7 (Jul. 1, 2021). ("OPUC Reply Brief")

¹³ *Id.*

¹⁴ PFD at 166.

¹⁵ *Id.* at 211.

¹⁶ OPUC Initial Brief at 18.

25.231(b);¹⁷ and (c) SWEPCO does not qualify for a limited exception to use initially estimated costs under 16 TAC § 25.246 (b)(1)(B).¹⁸

The ALJs rely on SWEPCO's use of target amounts and SWEPCO's historical ability to meet those targets to state that these amounts are known and measurable.¹⁹ This rationale falls short of what Commission rules require in plain text.²⁰ It is OPUC's position that a target amount is not a known and measurable amount until actually paid.²¹ Treating a target amount as a known and measurable change opens the door for utilities to inflate these levels at will at the expense of ratepayers, apparently until there is sufficient evidence to show that a utility no longer historically provides awards at or above target level.²² Unfortunately, by that point in time, ratepayers could be subject to decades of overpayment before there is sufficient data to reverse such a harmful trend. OPUC does not believe that this was the intent of the ALJs and would ask that the Commission consider this risk and re-evaluate the ALJs' position regarding the use of target level amounts of awarded short term incentive compensation.

ii. STI Payments for Union Employees

OPUC also takes exception to the ALJs decision to allow STI payments to SWEPCO's union employees, payments that otherwise violate Commission precedent, simply because of their status as union employees.²³ OPUC acknowledges that Public Utility Regulatory Act ("PURA") § 14.006 creates a statutory threshold to establish unreasonableness.²⁴ However, OPUC disputes that STI

¹⁷ *Id.* See 16 TAC § 25.231(b).

¹⁸ *Id.* at 19. See 16 TAC § 25.246 (b)(1)(B).

¹⁹ PFD at 215.

²⁰ 16 TAC § 25.231(b). ("In computing an electric utility's allowable expenses, *only the electric utility's historical test year expenses as adjusted for known and measurable changes will be considered*, except as provided for in any section of these rules dealing with fuel expenses." (Emphasis added)). See also 16 TAC § 25.246 (b)(1)(B). ("Update period -- For a utility that elects to file under paragraph (2)(B) of this subsection, the period beyond the end of the test year, for which period the electric utility initially submits estimated information and later submits actual information to be used in establishing its base rates. The update period chosen by the utility must end on the last day of a calendar or fiscal year quarter, and not later than the 30th day before the date the applicable rate proceeding is filed.").

²¹ OPUC Initial Brief at 19.

²² PFD at 215.

²³ *Id.*

²⁴ *Id.* See also PURA § 14.006 ("The commission may not interfere with employee wages and benefits, working conditions, or other terms or conditions of employment that are the product of a collective bargaining

payments based upon financially based incentive compensation, in violation of long standing Commission precedent that pre-dates the adoption of PURA § 14.006 and SWEPCO's current union contract, are reasonable.²⁵ In addition, OPUC contends that in enforcing its pre-existing precedent, the Commission is not in any way interfering with a union contract because the precedent pre-dates the adoption of the statute and ratification of the union contract.²⁶ As stated previously by OPUC:

“Because the Commission’s precedent was established prior to the execution of the contract, because the contract does not actually guarantee financially-based STI compensation, and because the Company can still negotiate for the inclusion of financially-based STI compensation at the Company’s expense, it is OPUC’s position that the Commission is not interfering with a collectively bargained agreement. To find otherwise would open the door for electric utilities to fill their union contracts with provisions that they know would otherwise violate Commission precedent and ratemaking principles under the guise of PURA § 14.006. SWEPCO should not be allowed to cultivate this absolute protection for union contracts with respect to financially-based STI compensation at the expense of its customers.”²⁷

OPUC notes that SWEPCO is still free to contract with their union employees as they wish, in accordance with PURA § 14.006.²⁸ The only result of a finding that STI Compensation for union employees should not include financially based incentive compensation is to validate

agreement recognized under federal law. An employee wage rate or benefit that is the product of the collective bargaining is presumed to be reasonable.”).

²⁵ OPUC Initial Brief at 19 – 22. OPUC Reply Brief at 9 – 10. *See: Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 46449, Order on Rehearing at FOF 129-135 (Mar. 19, 2018); *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 43695, Order on Rehearing at 5-6, FOF 83A-84A (Feb. 23, 2016); *Application of Southwestern Electric Power Company for Authority to Change Rates and Reconcile Fuel Costs*, Docket No. 40443, Order on Rehearing at 13, FOF 147 (Mar. 6, 2014); *Application of Entergy Texas, Inc. for Authority to Change Rates, Reconcile Fuel Costs, and Obtain Deferred Accounting Treatment*, Docket No. 39896, Order on Rehearing at 5, 7-8, FOF 60-61, 128-133 (Nov. 2, 2012); *Application of AEP Texas Central Company for Authority to Change Rates*, Docket No. 33309, Order on Rehearing at FOF 82 (Mar. 4, 2008); *Application of AEP Texas Central Company for Authority to Change Rates*, Docket No. 28840, Order at FOF 164-70 (Aug. 15, 2005).

²⁶ OPUC Initial Brief at 21.

²⁷ OPUC Reply Brief at 10.

²⁸ OPUC Initial Brief at 22.

Commission precedent that ratepayers should not bear the burden of those expenses. SWEPCO is still free to give this benefit to union employees, even with a finding for OPUC from the ALJs or the Commission, but ratepayers will not be financially burdened for decisions that violate Commission precedent. Because SWEPCO is still free to contract with their union employees as they wish, how can it be that their contract has been interfered with? The answer is that no interference has taken place, and PURA § 14.006 has not, in fact, been violated by the Commission.

Finally, OPUC notes the danger of allowing SWEPCO to cultivate this absolute protection for union employees. With this finding, the ALJs are potentially allowing any future utility to stuff their union contracts with benefits, now paid for by ratepayers, that violate Commission precedent and ratemaking principles.²⁹ For these reasons, OPUC respectfully requests that the Commission reverse the ALJs' position regarding STI payments for union employees and disallow SWEPCO's recovery of financially based STI payments to union employees.

CONCLUSION

For the reasons stated herein, OPUC respectfully requests that the Commission modify the PFD to include findings of fact and conclusions of law consistent with these exceptions and that OPUC be granted any other relief to which it may be entitled.

²⁹ OPUC Reply Brief at 10.

October 7, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 7th day of October 2021 by facsimile, electronic mail, and/or first class, U.S. Mail.



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